Supreme Court, U.S.
FILED
APR 12 2000

No. 99-1174

In the Supreme Court of the United States

HOLLIS EARL ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

LOIS J. SCHIFFER
Assistant Attorney General

WILLIAM B. LAZARUS
ETHAN G. SHENKMAN
LISA E. JONES
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

2699

QUESTIONS PRESENTED

1. Whether 25 U.S.C. 465, which authorizes the Secretary of the Interior to acquire interests in real property "for the purpose of providing land for Indians," is an unconstitutional delegation of legislative power.

2. Whether land acquired by the United States pursuant to 25 U.S.C. 465 and held in trust for the benefit of the Choctaw Nation is "Indian country" within the meaning of 18 U.S.C. 1151.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Alaska v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998) 2-3, 4, 14, 15, 16, 17
American Power & Light Co. v. *SEC*, 329 U.S. 90 (1946) 8, 9
American Trucking Ass'ns v. *United States Envtl. Protection Agency*, 195 F.3d 4 (D.C. Cir. 1999), petition for cert. pending, No. 99-1257 14
Central Mach. Co. v. *Arizona State Tax Comm'n*, 448 U.S. 160 (1980) 12
County of Yakima v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992) 9
Department of the Interior v. *South Dakota*, 519 U.S. 919 (1996) 6, 12, 13
Donnelly v. *United States*, 228 U.S. 243 (1913) 15
Florida Dep't of Bus. Regulation v. *United States Dep't of the Interior*, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986) 12, 13
Hagen v. *Utah*, 510 U.S. 399 (1994) 9
Langley v. *Ryder*, 778 F.2d 1092 (5th Cir. 1985) 16, 18
Lichter v. *United States*, 334 U.S. 742 (1948) 8, 11
Loving v. *United States*, 517 U.S. 748 (1996) 8
Mescalero Apache Tribe v. *Jones*, 411 U.S. 145 (1973) 9, 10, 17
Mistretta v. *United States*, 488 U.S. 361 (1989) 8, 9, 12
Morton v. *Mancari*, 417 U.S. 535 (1974) 9

BEST AVAILABLE COPY

Cases—Continued: Page

Narragansett Indian Tribe v. *Narragansett Elec. Co.*, 89 F.3d 908 (1st Cir. 1996) 18
National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 8
O'Connor v. *Donaldson*, 422 U.S. 563 (1975) 6
Oklahoma Tax Comm'n v. *Chickasaw Nation*, 515 U.S. 450 (1995) 17
Oklahoma Tax Comm'n v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) 4, 16, 17, 18, 19
Oklahoma Tax Comm'n v. *Sac & Fox Nation*, 508 U.S. 114 (1993) 17-18
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978) 2
South Dakota v. *United States Dep't of the Interior*:
106 F.3d 247 (8th Cir. 1996) 6
69 F.3d 878 (8th Cir. 1995) 6, 7
Touby v. *United States*, 500 U.S. 160 (1991) 7
United States v. *Azure*, 801 F.2d 336 (8th Cir. 1986) 16, 19
United States v. *Celestine*, 215 U.S. 278 (1909) 9-10
United States v. *Cook*, 922 F.2d 1026 (2d Cir.), cert. denied, 500 U.S. 941 (1991) 18
United States v. *Driver*, 945 F.2d 1410 (8th Cir. 1991), cert. denied, 502 U.S. 1109 (1992) 18, 19
United States v. *Hitchcock*, 205 U.S. 80 (1907) 12
United States v. *Jackson*, 280 U.S. 183 (1930) 12
United States v. *John*, 437 U.S. 634 (1978) 18
United States v. *Kagama*, 118 U.S. 375 (1886) 2
United States v. *McGowan*, 302 U.S. 535 (1938) 15, 18
United States v. *Mitchell*, 463 U.S. 206 (1983) 12
United States v. *Mottaz*, 476 U.S. 834 (1986) 6
United States v. *Pelican*, 232 U.S. 442 (1914) 15
United States v. *Sandoval*, 231 U.S. 28 (1913) 15
United States v. *South Dakota*, 665 F.2d 837 (8th Cir. 1981), cert. denied, 459 U.S. 823 (1982) 19

Cases—Continued: Page

United States v. *Stands*, 105 F.3d 1565 (8th Cir. 1997), cert. denied, 522 U.S. 841 19
Yakus v. *United States*, 321 U.S. 414 (1944) 8

Statutes, regulations and rule:

Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385 2
Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:
5 U.S.C. 701(a)(2) 13
5 U.S.C. 702 13
Clean Air Act, § 109, 42 U.S.C. 7409 14
General Allotment Act of 1887, ch. 119, 24 Stat. 388 9
Indian Land Consolidation Act, 25 U.S.C. 2201 *et seq.* 11
Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.* 5
25 U.S.C. 465 ..... *passim*
Indian Reorganization Act Amendments of 1988, Pub. L. No. 100-581, Title I, § 101, 102 Stat. 2938 11
Indian Reorganization Act Amendments of 1990, Pub. L. No. 101-301, 104 Stat. 202:
§ 3(b), 104 Stat. 207 11
§ 3(c), 104 Stat. 207 11
Indian Reorganization Act Amendments of 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 709 11
Quiet Title Act, 28 U.S.C. 2409a 13
28 U.S.C. 2409a(a) 6
48 Stat. 984 (preamble) 10
18 U.S.C. 1151 ..... 2, 3, 4, 5, 14, 15, 17
18 U.S.C. 1151(a) 14, 16
18 U.S.C. 1151(b) 15, 16, 18
18 U.S.C. 1151(c) 15
18 U.S.C. 1152 6
18 U.S.C. 1153 ..... 2, 6
18 U.S.C. 1153(a) 2
18 U.S.C. 2241 2
18 U.S.C. 2241(a)(1) 3
18 U.S.C. 2242 ..... 2, 3

Statute, regulations and rule—Continued:	Page
18 U.S.C. 2244	2, 3
28 U.S.C. 2106	7
25 C.F.R.:	
Pt. 151	10
Section 151.3	10
Section 151.3(a)(1)	11
Section 151.3(a)(2)	11
Section 151.3(a)(3)	11
Section 151.10(b)	11
Section 151.10(c)	11
Section 151.11(c)	11
Section 151.12	13
Sup. Ct. R. 10(a)	7
Miscellaneous:	
61 Fed. Reg. 18,082 (1996)	13
H.R. Rep. No. 1804, 73d Cong., 2d Sess. (1934)	9

In the Supreme Court of the United States

No. 99-1174

HOLLIS EARL ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 185 F.3d 1125. The opinion of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 38a-52a) is reported at 904 F. Supp. 1262.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1999. A petition for rehearing was denied on September 14, 1999 (Pet. App. 53a). On December 2, 1999, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including January 12, 2000, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Oklahoma, petitioner was convicted on one count of aggravated sexual abuse, in violation of 18 U.S.C. 2242, and two counts of abusive sexual contact, in violation of 18 U.S.C. 2244. He was sentenced to concurrent terms of imprisonment of 135 months on the Section 2242 count and 36 months on each of the Section 2244 counts. The court of appeals affirmed. Pet. App. 1a-37a.

1. Under 18 U.S.C. 1153(a), the United States has jurisdiction to prosecute specified offenses committed by Indians in "Indian country." That statutory provision, known as the "Major Crimes Act," was enacted in 1885. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385. See *United States* v. *Kagama*, 118 U.S. 375 (1886) (upholding the Major Crimes Act).[1]

The offenses specified in Section 1153 include "a felony under chapter 109A" of Title 18, such as aggravated sexual abuse (18 U.S.C. 2241), sexual abuse (18 U.S.C. 2242), and abusive sexual contact (18 U.S.C. 2244). See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 203-204 & n.14 (1978) (discussing Section 1153).

The term "Indian country" is defined in 18 U.S.C. 1151 to encompass three categories of land: "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government * * *, (b) all dependent Indian communities * * *, and (c) all Indian allotments, the Indian titles to which have not been extinguished." See *Alaska* v. *Native Village of*

---

[1] The Major Crimes Act was amended in 1948 as part of the codification of the term "Indian country."

Venetie Tribal Gov't, 522 U.S. 520, 526-531 (1998) *(discussing Section 1151)*.

2. Petitioner is a member of the Choctaw Nation of Oklahoma. At the time of the events at issue in this case, petitioner was the Choctaw Nation's Principal Chief. Pet. App. 1a-2a.

In June 1995, a federal grand jury returned an indictment charging petitioner with two counts of aggravated sexual abuse, in violation of 18 U.S.C. 2241(a)(1) (Counts II and IV); one count of sexual abuse, in violation of 18 U.S.C. 2242 (Count V); and five counts of abusive sexual contact, in violation of 18 U.S.C. 2244 (Counts I, III, VI, VII, and VIII). The indictment alleged that, from at least 1990 to 1993, petitioner engaged in acts of forcible sexual relations, abusive sexual contact, and aggravated sexual assault against women who were employed by the Choctaw Nation. Pet. App. 1a-3a.

Those acts were alleged to have occurred at the Choctaw Nation Tribal Complex, which is located on land that the United States holds in trust for the Choctaw Nation. The Tribal Complex serves as the headquarters for the Choctaw Nation, and between 60 and 70 employees of the Choctaw Nation work there. The Choctaw Nation also operates bingo games at the Tribal Complex. Pet. App. 3a, 40a.

Petitioner moved to dismiss the indictment. He contended that the United States did not have jurisdiction to prosecute him because the land on which the alleged offenses occurred is not Indian country under 18 U.S.C. 1151. He argued that the land on which the Choctaw Nation Tribal Complex is located was never validly taken into trust by the Secretary of the Interior, and, in any event, that land held by the Secretary in trust for an Indian Tribe outside of a formal reservation

cannot constitute Indian country. The district court denied petitioner's motion. Pet. App. 38a-52a.

The case proceeded to trial. The jury found petitioner guilty on one count of aggravated sexual abuse (Count II) and two counts of abusive sexual contact (Counts I and VI). The jury found petitioner not guilty on four other counts. Pet. App. 3a.[2]

3. The court of appeals affirmed petitioner's convictions and sentences. The court held, *inter alia*, that the United States had jurisdiction to prosecute petitioner. Pet. App. 3a-19a.

First, the court of appeals held that the Choctaw Nation Tribal Complex, the place where petitioner's offenses occurred, is within Indian country for purposes of 18 U.S.C. 1151. Pet. App. 4a-17a. The court rejected petitioner's argument that, because the land on which the Tribal Complex is located is not within a formally recognized reservation, the land cannot constitute Indian country. The court noted that this Court has considered two criteria in determining whether lands that are not within such a formal reservation are Indian country under Section 1151: whether the lands have been "validly set apart for the use of Indians as such," and whether the lands are "under the superintendence of the [federal] Government." *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991); accord *Native Village of Venetie*, 522 U.S. at 527. The court concluded that the land at issue here, which the United States acquired and holds in trust for the Choctaw Nation, satisfies both criteria.

Second, the court of appeals held that the Secretary of the Interior has the authority under 25 U.S.C. 465 to

---

[2] The district court dismissed one count (Count VIII) before trial on the government's motion. Gov't C.A. Br. 3.

acquire lands to be held in trust by the United States for the benefit of an Indian Tribe. Pet. App. 17a-19a. The court rejected petitioner's contention that Section 465 is an unconstitutional delegation of legislative authority. The court explained that the text and purposes of the Indian Reorganization Act, of which Section 465 is a part, provide standards to guide the Secretary's discretion: The text of the Act states that the lands are to be acquired "for Indians," and the purposes of the Act include "rehabilitating the Indian's economic life" and "developing the initiative destroyed by . . . oppression and paternalism." Pet. App. 18a.

ARGUMENT

The decision of the Tenth Circuit is correct on both questions presented by the petition. Congress, in the Indian Reorganization Act of 1934, 25 U.S.C. 461 *et seq.*, vested in the Secretary of the Interior the authority to acquire lands to be held by the United States in trust for the benefit of Indian Tribes. This Court has recognized trust lands as Indian country for purposes of 18 U.S.C. 1151, whether or not they are within the external boundaries of a formally recognized reservation. Neither aspect of the Tenth Circuit's decision conflicts with any decision of this Court or of any other court of appeals. This Court's review is therefore not warranted.

1. Petitioner urges (Pet. 9-20) the Court to resolve a purported conflict among the circuits concerning the constitutionality of 25 U.S.C. 465. But no such conflict exists. In this case, the court of appeals held that Section 465 does not violate the non-delegation doctrine.

Petitioner does not identify any extant decision that holds otherwise.[3]

a. Petitioner asserts (Pet. 13) that the decision below conflicts with the "reasoning" of the Eighth Circuit in *South Dakota* v. *United States Department of the Interior*, 69 F.3d 878 (1995). As petitioner acknowledges (Pet. 12), however, this Court granted the government's petition for a writ of certiorari in the *South Dakota* case, vacated the Eighth Circuit's judgment, and directed that the matter be remanded to the Secretary of the Interior for reconsideration of his administrative decision. *Department of the Interior* v. *South Dakota*, 519 U.S. 919 (1996); see *South Dakota* v. *United States Dep't of the Interior*, 106 F.3d 247 (8th Cir. 1996) (recalling the mandate, vacating the judgment, and remanding to the Secretary). The Eighth Circuit's "reasoning" is, consequently, not embodied in any valid judgment or decision. See *O'Connor* v. *Donaldson*, 422 U.S. 563, 577-578 n.12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect.").

---

[3] As an initial matter, there is reason to question whether a defendant, in a prosecution under 18 U.S.C. 1152 or 18 U.S.C. 1153 for an offense allegedly committed on tribal trust land, should be entitled to challenge whether the land was validly taken into trust by the United States. In the Quiet Title Act, 28 U.S.C. 2409a, Congress has barred challenges to the United States' title to land held in trust for Indians. See 28 U.S.C. 2409a(a); *United States* v. *Mottaz*, 476 U.S. 834, 842-843 & n.6 (1986). Moreover, this case would be an especially inappropriate vehicle for considering the Indian country status of lands such as those at issue here, since the lands on which petitioner committed the offenses served as the seat of government for the Choctaw Nation and since petitioner was the Principal Chief of the Choctaw Nation during the time of the offenses.

This case thus does not present a circuit conflict—*i.e.*, a "conflict with the *decision* of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a) (emphasis added)—that merits this Court's review. This Court reviews "judgment[s], decree[s], or order[s]" of lower courts, not the reasoning upon which such judgments, decrees, or orders are based. 28 U.S.C. 2106. And there is no judgment of any court that rests on a holding, contrary to the Tenth Circuit's holding here, that 25 U.S.C. 465 violates the non-delegation doctrine.[4]

b. In any event, the Eighth Circuit's reasoning in its vacated *South Dakota* decision is contrary to this Court's non-delegation jurisprudence. The text, structure, and purposes of the Indian Reorganization Act of 1934, of which 25 U.S.C. 465 is a part, provide significant guidance for the Secretary of the Interior's exercise of his discretion to acquire lands to be held in trust for the benefit of Indian Tribes. Section 465 consequently is fully consistent with the non-delegation doctrine. The Tenth Circuit so recognized in this case.

It is well settled that "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby* v. *United States*, 500 U.S. 160, 165 (1991). It is "constitutionally sufficient if

---

[4] Petitioner suggests (Pet. 12) that the Court vacated the judgment in *South Dakota* not because the Court disagreed with the Eighth Circuit's reasoning on the non-delegation issue, but because the Secretary of the Interior had issued new regulations governing acquisitions under Section 465. It makes no difference, however, why the Court vacated the Eighth Circuit's judgment. It is the *fact* of vacatur, for whatever reason, that renders the judgment (and therefore the reasoning) of the court of appeals in *South Dakota* without any continuing effect.

Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989) (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)).

Although "in 1935 [the Court] struck down two delegations for lack of an intelligible principle," the Court has "since upheld, without exception, delegations under standards phrased in sweeping terms." *Loving* v. *United States*, 517 U.S. 748, 771 (1996); see, *e.g.*, *Lichter* v. *United States*, 334 U.S. 742, 778-786 (1948) (upholding a statute authorizing the War Department to recover "excessive profits" earned on military contracts); *Yakus* v. *United States*, 321 U.S. 414, 420-427 (1944) (upholding a statute authorizing the Price Administrator to set prices that are "generally fair and equitable and will effectuate the purposes of [the Emergency Price Control] Act"); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943) (upholding a statute authorizing the Federal Communications Commission to regulate broadcasting according to the "public interest, convenience, or necessity").

The Court has explained that such terms "need not be tested in isolation." *American Power & Light Co.*, 329 U.S. at 104. Instead, the terms may derive content from "the purpose of the Act, its factual background and the statutory context in which they appear." *Ibid.*; see, *e.g.*, *Lichter*, 334 U.S. at 785 (in considering whether Congress had constrained the Price Administrator's discretion to recover "excessive profits," the Court considered "[t]he purpose of the Renegotiation Act and its factual background").

Congress, in the Indian Reorganization Act, provided sufficient direction to guide the Secretary of the Interior's acquisition of land under 25 U.S.C. 465.

Section 465 states that "[t]he Secretary of the Interior is hereby authorized, in his discretion, to acquire * * * any interest in lands, water rights, or surface rights to lands * * * for the purpose of providing land for Indians." It thus sets forth both the "general policy" of Congress (*i.e.*, that the federal government acquire land "for Indians") and "the public agency which is to apply it" (*i.e.*, the Secretary of the Interior and his designees). *Mistretta*, 488 U.S. at 372-373. The "boundaries of [the Secretary's] delegated authority," *ibid.*, under Section 465 may be discerned in this case, as in the cases cited above, in the purposes of the Act as a whole, its factual background, and the statutory context. *American Power & Light Co.*, 329 U.S. at 104.

Congress enacted the Indian Reorganization Act to promote Indian self-government and economic self-sufficiency. See *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152-154 (1973) ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'") (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934)); accord *Morton* v. *Mancari*, 417 U.S. 535, 542 (1974). Congress was particularly concerned with reversing the "disastrous" consequences of the General Allotment Act of 1887, ch. 119, 24 Stat. 388, which had eroded the tribal land base and weakened tribal organizations. *Hagen* v. *Utah*, 510 U.S. 399, 425 n.5 (1994).[5] Congress identified "conserv[ing] and

---

[5] The General Allotment Act, together with similar legislation enacted by Congress in the late Nineteenth Century, sought to allot tribal lands to individual members and to make available any remaining lands for sale to non-Indian settlers. See *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 253-254 (1992); see also *United States* v.

develop[ing] Indian lands and resources" as one of the purposes of the Indian Reorganization Act. 48 Stat. 984 (preamble).

The purposes and history of the Indian Reorganization Act significantly inform the Secretary's exercise of his authority under Section 465. The Secretary may acquire land "for Indians," within the intent of Section 465, when the acquisition would serve such purposes as advancing tribal economic development, assisting tribal self-governance, and restoring the ancestral tribal land base. See, *e.g.*, *Mescalero Apache Tribe*, 411 U.S. at 155 & n.11, 157 (noting that the United States acted under Section 465 in making federal land available to a Tribe "for the purpose of carrying on a business enterprise").

The Secretary of the Interior has recognized that Section 465 does not confer boundless discretion. The Secretary has promulgated implementing regulations that articulate specific factors, derived from Congress's purposes in the Indian Reorganization Act and the Secretary's experience in administering it, to guide the Secretary's exercise of his discretion to take lands into trust for Tribes and individual Indians. See 25 C.F.R. Pt. 151.[6] The regulations set forth a "land acquisition policy," 25 C.F.R. 151.3, which restricts acquisitions to three circumstances: when the land is within or adjacent to an existing reservation, when the land is already owned by the Tribe, or when "the acquisition of

---

Celestine, 215 U.S. 278, 290 (1909) (observing that the General Allotment Act embodied a congressional policy "which look[ed] to the breaking up of tribal relations," "put[ting] an end to tribal organization," abolishing reservations, and "establishing of the separate Indians in individual homes").

[6] The initial regulations were promulgated in 1980, after the land at issue here was taken into trust. The regulations were amended in 1996. See note 9, *infra*.

the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. 151.3(a)(1)-(3). The regulations then set forth particular factors to guide the Secretary's decision whether to acquire such land, including "[t]he need of the individual Indian or the tribe for additional land" (25 C.F.R. 151.10(b)), "[t]he purposes for which the land will be used" (25 C.F.R. 151.10(c)), and, if the land is outside a reservation and is to be used for a tribal business purpose, "the anticipated economic benefits associated with the proposed use" (25 C.F.R. 151.11(c)). By setting out ascertainable standards that govern trust acquisition decisions, the Secretary has not only observed, but has given concrete expression to, the Indian Reorganization Act's limiting principles. Cf. *Lichter*, 334 U.S. at 783 (recognizing that subsequent "administrative practices" under a statute may demonstrate the "definitive adequacy" of the terms of the statutory authorization).[7]

In sum, the court of appeals' decision in this case reflects a "practical understanding that in our increasingly complex society * * * Congress simply cannot do its job absent an ability to delegate power under

---

[7] Congress has revisited the Indian Reorganization Act on several occasions since the Secretary's promulgation of the land acquisition regulations. See Indian Reorganization Act Amendments of 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 709; Indian Reorganization Act Amendments of 1990, Pub. L. No. 101-301, § 3(b)-(c), 104 Stat. 207; Indian Reorganization Act Amendments of 1988, Pub. L. No. 100-581, Title I, § 101, 102 Stat. 2938; see also Indian Land Consolidation Act, 25 U.S.C. 2201 *et seq.* (extending the reach of 25 U.S.C. 465 to all Tribes). Congress has not expressed any disagreement with the Secretary's understanding of his authority under 25 U.S.C. 465 to acquire land in trust for Tribes and individual Indians.

broad general directives." *Mistretta*, 488 U.S. at 372. The directive at issue here, while to some extent "broad" and "general," nonetheless is accompanied by ample statutory guidance for the Secretary's exercise of his discretion. Moreover, in an area in which the Executive has historically exercised broad authority, such as the supervision of lands occupied by Indians,[8] such directives are especially appropriate. Section 465 does not, therefore, violate the non-delegation doctrine.

Section 465 has been in effect for more than 65 years, and the Secretary has relied upon it over that period to acquire more than nine million acres of land. See Pet. at 17, *Department of the Interior* v. *South Dakota*, 519 U.S. 919 (1996). Petitioner's contentions here call into question the status of those lands, on which numerous Tribes have come to depend. Such lands are often essential for tribal governmental and economic purposes, and the lands at issue here have been used by the Choctaw Nation for those purposes. Nothing in the practical experience under Section 465 suggests a basis for its invalidation at this late date.

c. Petitioner further contends (Pet. 13-14) that the decision below conflicts with *Florida Department of Business Regulation* v. *United States Department of the Interior*, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986). Petitioner is mistaken.

In *Florida Department of Business Regulation*, various state agencies challenged the Secretary's decision, pursuant to 25 U.S.C. 465, to acquire land to be held in trust for the Seminole Indians. Noting that the

---

[8] See, *e.g.*, *United States* v. *Mitchell*, 463 U.S. 206, 209 (1983); *Central Mach. Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160, 163 (1980); *United States* v. *Jackson*, 280 U.S. 183, 191 (1930); *United States* v. *Hitchcock*, 205 U.S. 80, 85 (1907).

Quiet Title Act, 28 U.S.C. 2409a, bars title challenges to trust or restricted Indian lands, the court of appeals held that, once land has been transferred into trust status, judicial review of the Secretary's decision to acquire the land is impliedly forbidden under Section 702 of the Administrative Procedure Act (APA), 5 U.S.C. 702. 768 F.2d at 1254. The court therefore held that the APA did not waive the United States' sovereign immunity for purposes of that case. *Id.* at 1254-1255. The court also held that the Secretary's decision was unreviewable under Section 701(a)(2) of the APA, 5 U.S.C. 701(a)(2), as a decision "committed to agency discretion by law." 768 F.2d at 1255.[9]

As petitioner concedes (Pet. 14 n.5) and as the Eleventh Circuit expressly noted, the state agencies in *Florida Department of Business Regulation* did "not challenge the constitutionality of the Secretary's acts [*i.e.*, acquiring trust lands] nor the constitutionality of the statute pursuant to which he acted [*i.e.*, 25 U.S.C. 465]." 768 F.2d at 1252.[10] As a consequence, the court

---

[9] The United States now takes the position that review is available under the APA of the Secretary's decisions to acquire land in trust, if review is sought before the United States actually takes the land into trust for that purpose. See Pet. at 24-25, *Department of the Interior* v. *South Dakota*, 519 U.S. 919 (1996), (No. 95-1956); see also 61 Fed. Reg. 18,082 (1996) (promulgating a regulation, now codified at 25 C.F.R. 151.12, to provide an opportunity for judicial review before land is taken into trust).

[10] Petitioner nonetheless asserts (Pet. 14 n.5) that the Eleventh Circuit concluded that 25 U.S.C. 465 "confers standardless authority on the Executive to acquire land." But the Eleventh Circuit did not hold that Section 465 confers standardless authority on the Secretary of the Interior. Rather, the court held that Section 465 grants the Secretary broad discretion that is not judicially reviewable under the APA. That decision does not purport to address the constitutionality of Section 465.

of appeals had no occasion to address whether Section 465 is an unconstitutional delegation of legislative power. The Eleventh Circuit's holding therefore poses no conflict with the Tenth Circuit's holding in this case.[11]

2. Petitioner asserts (Pet. 22) that the decision below "deepen[s]" a circuit conflict over whether Indian country, within the meaning of 18 U.S.C. 1151, encompasses tribal trust land that is not within the external boundaries of a formal reservation. No such conflict exists. The Tenth Circuit's resolution of the question is correct and consistent with the decisions of this Court and other courts of appeals.

a. Historically, the term "Indian country" has been used to identify land that, "[g]enerally speaking," is subject to the "primary jurisdiction * * * [of] the Federal Government and the Indian tribe inhabiting it." *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998). In 1948, Congress enacted the statutory definition of Indian country, which consists of "all land within the limits of any Indian reservation," 18 U.S.C. 1151(a); "all dependent Indian com-

---

[11] As petitioner notes, the United States recently filed a petition for a writ of certiorari in *American Trucking Associations* v. *United States Environmental Protection Agency*, 195 F.3d 4 (D.C. Cir. 1999) (holding that Section 109 of the Clean Air Act, 42 U.S.C. 7409, as interpreted by the EPA, is an unconstitutional delegation of legislative power), petition for cert. pending *sub nom. Browner* v. *American Trucking Ass'ns*, No. 99-1257 (filed Jan. 27, 2000). There is no need for the Court to hold the petition in this case pending the disposition of the petition in *American Trucking*. The two cases involve different statutes, different agencies, and different governmental programs; this case arises in the unique context of a challenge by a tribal member to the United States' title to lands held in trust for Indians. See pp. 3, 6 note 3, *supra*.

munities," 18 U.S.C. 1151(b); and "all Indian allotments, the Indian titles to which have not been extinguished," 18 U.S.C. 1151(c).

Section 1151 reflects the two criteria that this Court "previously * * * had held necessary for a finding of 'Indian country'": "first, [the lands] must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Native Village of Venetie*, 522 U.S. at 527. Prior to the enactment of Section 1151 in 1948, this Court had already found that reservation lands and allotments satisfied those requirements. See, *e.g.*, *United States* v. *Pelican*, 232 U.S. 442, 449 (1914) (Indian country includes individual Indian allotments held in trust by the United States because they "remain[] Indian lands set apart for Indians under governmental care"); *Donnelly* v. *United States*, 228 U.S. 243, 269 (1913) (Indian country includes lands within formal reservations). Congress used the term "dependent Indian communities" in Section 1151(b) to codify this Court's understanding, as expressed in *United States* v. *McGowan*, 302 U.S. 535 (1938), and *United States* v. *Sandoval*, 231 U.S. 28 (1913), that other lands, although not formally designated as a reservation, may also possess the attributes of "federal set-aside" and "federal superintendence" characteristic of Indian country. *Native Village of Venetie*, 522 U.S. at 530; see, *e.g.*, *McGowan*, 302 U.S. at 538-539 (Reno Indian Colony land held in trust by the United States is Indian country); *Sandoval*, 231 U.S. at 45-49 (same for Pueblo Indian lands).

Here, the court of appeals, consistent with *Native Village of Venetie*, held that the trust lands at issue are "Indian country," within the meaning of Section 1151, because they are "validly set-aside for the tribe under

the superintendence of the federal government." Pet. App. 11a. The court found it unnecessary to decide whether those lands are more properly categorized as an informal reservation, under Section 1151(a), or as a dependent Indian community, under Section 1151(b), because "no matter which categorical label we choose to affix, the property in this case, owned by the United States in trust for the Choctaw Nation, is Indian Country." *Ibid.*[12] The court recognized that this Court has used both labels in engaging in essentially the same analysis of the Indian country status of land that was neither a formal reservation nor an allotment. The Court engaged in that analysis in *Native Village of Venetie*, 522 U.S. at 532-534, in considering whether the fee lands at issue were a dependent Indian community under Section 1151(b), whereas the Court engaged in that analysis in *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991), in considering whether the trust lands at issue were an informal reservation under Section 1151(a). Contrary to petitioner's assertion (Pet. 23), then, the court of appeals did not create a "*fourth* category" of Indian country. Rather, the court recognized that the trust lands at issue come within at least one of the three statutory categories, because the trust lands possess the two characteristics of Indian country reflected in

---

[12] The Eighth Circuit has taken a similar approach. See *United States* v. *Azure*, 801 F.2d 336, 339 (1986) (holding that, because a house located on trust land that is not part of a formal reservation is "part of either a *de facto* reservation or a dependent Indian community," the "house is located in Indian country"); cf. *Langley* v. *Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985) ("[W]hether lands are merely held in trust for the Indians or whether the lands have officially been proclaimed a reservation, the lands are clearly Indian country.").

Section 1151. See *Native Village of Venetie*, 522 U.S. at 527.

The court of appeals' decision is in accord with several decisions of this Court holding or assuming that tribal trust lands were Indian country although they were not part of a formal reservation. In *Potawatomi*, the Court concluded that lands held in trust by the United States for the Tribe were "validly set apart for the use of the Indians as such, under the superintendence of the Government," and therefore were Indian country, with the consequence that the State did not have the authority to tax sales of goods to tribal members that occurred on those lands. 498 U.S. at 511. The Court specifically rejected the contention that the tribal trust land was not Indian country because it was not a reservation, noting that no "precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges." *Ibid.*[13] See also *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 452-453 & n.2 (1995) (treating tribal trust lands as Indian country); *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123-125

---

[13] Petitioner erroneously contends (Pet. 26) that the Court's ruling in *Potawatomi* on the Indian country status of the trust lands was dictum, asserting that 25 U.S.C. 465 prevents a State from taxing sales to tribal members on trust lands, whether or not the lands are Indian country. Petitioner misunderstands the provision of Section 465 that states that "such lands or rights [held by the United States in trust for Indians] shall be exempt from State and local taxation." The provision exempts only the lands (or rights) themselves from state taxation. It does not prevent the imposition of a state sales tax on goods sold on the lands. See *Mescalero Apache Tribe*, 411 U.S. at 155-158. The *Potawatomi* Court therefore understood that the question in that case turned on, *inter alia*, whether the locus of the sale was in Indian country.

(1993) (same); *United States* v. *John*, 437 U.S. 634, 649 (1978) (observing that "[t]here is no apparent reason why these lands, which had been purchased [by the United States] in previous years for the aid of those Indians, did not become a 'reservation,' at least for purposes of federal criminal jurisdiction"); *McGowan*, 302 U.S. at 539.

Nor is there any conflict between the decision below and the decisions of other circuits. The courts of appeals have consistently rejected claims that trust land that is not part of a formal reservation is not Indian country. See, *e.g.*, *United States* v. *Driver*, 945 F.2d 1410, 1415 (8th Cir. 1991), cert. denied, 502 U.S. 1109 (1992); *Langley* v. *Rider*, 778 F.2d 1092, 1095 (5th Cir. 1985); cf. *United States* v. *Cook*, 922 F.2d 1026, 1031 (2d Cir.) (land owned by Indians but supervised by the United States), cert. denied, 500 U.S. 941 (1991). See generally *Narragansett Indian Tribe* v. *Narragansett Elec. Co.*, 89 F.3d 908, 920 (1st Cir. 1996) ("[T]he vast majority of cases we have found which analyze what constitutes a dependent Indian community since § 1151(b) was enacted find there is such a community if the land is held in trust * * * or as settlement lands.").[14]

---

[14] Petitioner suggests (Pet. 24-25) that this case is distinguishable because the trust lands are used for tribal government and tribal business purposes, rather than for tribal housing. But petitioner cites no case resting on any such distinction. To the contrary, the trust lands that the Court held to be Indian country in *Potawatomi* were used for tribal business purposes. See 498 U.S. at 507, 511. Indeed, the fact that the trust lands at issue are the seat of the tribal government *supports* the conclusion that those lands are Indian country, and thus are subject to the primary criminal jurisdiction of the United States and the Tribe, rather than the State.

No question of the status of trust lands as Indian country was presented in *United States* v. *Stands*, 105 F.3d 1565 (8th Cir. 1997), the only decision that petitioner claims (Pet. 21-22) to conflict with the decision below. *Stands* concerned the status of an individual Indian allotment, which the court of appeals held to be Indian country. 105 F.3d at 1574; see *ibid.* (observing that trial testimony concerning "trust land" was "essentially irrelevant to the question at hand"). In passing, the court stated, without analysis, that "[f]or jurisdictional purposes, tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country." *Id.* at 1572. But the court also acknowledged that "[i]n some circumstances, off-reservation tribal trust land may be considered Indian country." *Id.* at 1572 n.3. The former statement is mere dictum—not what the court actually "held," as petitioner erroneously asserts (Pet. 21)—and, in any event, is unsupported by the Eighth Circuit's own precedents. See, *e.g.*, *Driver*, 945 F.2d at 1415; *United States* v. *Azure*, 801 F.2d 336, 338-339 (1986); *United States* v. *South Dakota*, 665 F.2d 837, 839-843 (1981), cert. denied, 459 U.S. 823 (1982); see also, *e.g.*, *Potawatomi*, 498 U.S. at 511.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

WILLIAM B. LAZARUS
ETHAN G. SHENKMAN
LISA E. JONES
Attorneys

APRIL 2000